

Appeal No. 03-2027

Cir. Ct. No. 01CV000180

**WISCONSIN COURT OF APPEALS
DISTRICT III**

**KLOVER E. LAGERSTROM, AS SURVIVING SPOUSE OF,
AND AS SPECIAL ADMINISTRATOR OF THE ESTATE OF
VANCE H. LAGERSTROM,**

PLAINTIFF-APPELLANT,

FILED

V.

May 11, 2004

**MYRTLE WERTH HOSPITAL-MAYO HEALTH SYSTEM,
ABC INSURANCE COMPANY, ITS INSURER, RED CEDAR
CLINIC-MAYO HEALTH SYSTEM, AND DEF INSURANCE
COMPANY, ITS INSURER,**

Cornelia G. Clark
Clerk of Supreme Court

DEFENDANTS-RESPONDENTS.

CERTIFICATION BY WISCONSIN COURT OF APPEALS

Before Cane, C.J., Hoover, P.J., and Peterson, J.

We certify this appeal to the Wisconsin Supreme Court to determine whether WIS. STAT. § 893.55(7),¹ which abrogates the collateral source rule in medical malpractice actions, is unconstitutional because it violates separation of powers, equal protection or the plaintiff's due process rights.²

¹ All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

² The parties disagree on whether the statute explicitly abrogates the common law and the appellant raises additional issues in support of her request for a new trial and her challenge to the jury's award of zero damages for funeral expenses.

Vance Lagerstrom was treated by the defendant healthcare providers after he broke his hip. Medical personnel negligently inserted a feeding tube into his lung and deposited a mixture of Ensure and water. Twelve weeks later, Lagerstrom died. Although the cause of death was disputed, the death certificate indicates he died of pneumonia.

Lagerstrom's wife and estate sued the healthcare providers. The trial court followed the mandate of WIS. STAT. § 893.55(7),³ and allowed the jury to hear evidence that parts of Lagerstrom's treatment were paid by a combination of Medicare payments, medical provider write-offs and private insurance. The jury awarded \$755 for medical expenses and "0" for funeral expenses.

WISCONSIN STAT. § 893.55(7) allows evidence of compensation received from other sources in medical malpractice actions. The legislative history shows that the amendment was intended to modify the collateral source rule by allowing evidence regarding other sources of compensation in a malpractice action. The law does not require an offset or reduction of any malpractice award by the amount of the other payments, but merely allows the jury to reduce the award on a case-by-case basis. The Senate Committee on Health Services and Aging specifically rejected a proposal to require juries to offset or reduce the award by amounts received from collateral sources.

³ WISCONSIN STAT. § 893.55(7):

Evidence of any compensation for bodily injury received from sources other than the defendant to compensate the claimant for the injury is admissible in an action to recover damages for medical malpractice. This section does not limit the substantive or procedural rights of persons who have claims based upon subrogation.

But for the existence of WIS. STAT. § 893.55(7), the collateral source rule would have prohibited the jury from reducing the award by the amounts received from other sources or from hearing any evidence on that question. The court has concluded that evidence of payments by collateral sources is irrelevant and prejudicial. *See Koffman v. Leichtfuss*, 2001 WI 111, ¶53, 246 Wis. 2d 31, 630 N.W.2d 201. The legislature can make evidence relevant by changing the substantive law on the measure of damages and allowable setoffs. Although § 893.55(7) directly addresses only the admissibility of evidence, the statute and the legislative history demonstrate the legislature's intent to change the substantive law by allowing the jury to reduce its award by amounts received from collateral sources.

The legislature has the power to regulate areas of practice, procedure and evidence, so long as it does not materially impair or practically defeat the proper functioning of the judicial system. *See State v. Mitchell*, 144 Wis. 2d 596, 615, 424 N.W.2d 698 (1988). As a co-equal branch of government, the legislature may declare the State's public policy and adjust the admissibility of evidence according to its standards of relevancy. *Id.* at 616.

In adopting WIS. STAT. § 893.55(7), however, the legislature assigned to the jury the right to decide the measure of damages, a question of law. *See Magestro v. North Star Envtl. Const.*, 2002 WI App 182, ¶10, 256 Wis. 2d 744, 649 N.W.2d 722. The jury ordinarily determines the amount of damages; the measure of damages is a question of law to be decided by the judge or the legislature. While the legislature can declare the State's public policy regarding the relevancy of evidence, a question arises whether it can assign that responsibility to juries to be determined on a case-by-case basis. Arguably, by

assigning the jury the task of deciding the measure of damages, the legislature has impermissibly interfered in the functioning of the court.

Lagerstrom also argues that allowing the jury to determine the measure of damages on a case-by-case basis violates a plaintiff's constitutional rights to equal protection and due process by encouraging arbitrary and inconsistent awards. A plaintiff's due process rights are violated by the arbitrary and unguided application of the law to the facts of the case. *See Pacific Mut. Life Ins. Co. v. Hasp*, 499 U.S. 1, 64 (1991). Equal protection of the law requires that each jury applies the same law to the facts. *See Matter of A.M.K.*, 105 Wis. 2d 91, 104, 312 N.W.2d 840 (Ct. App. 1981). Lagerstrom questions whether a legitimate governmental purpose is served by a law that allows but does not compel the jury to reduce the damage award by amounts received from a collateral source. The goal of eliminating windfall recoveries for plaintiffs is not necessarily accomplished by merely allowing the jury to hear evidence of collateral source payments without requiring the jury to adjust the award on that basis. In addition, a classification must apply equally to all within the class to satisfy the rational basis test. *See Aicher v. Wisconsin Patients Compensation Fund*, 2000 WI 98, ¶58, 237 Wis. 2d 99, 613 N.W.2d 849. While there may be a legitimate governmental interest in allowing a setoff in medical malpractice claims that is not allowed for other tort claims, the equal protection and due process clauses may require that the legislature uniformly compel the setoff rather than allowing the jury to determine whether it wishes to reduce the award by amounts paid by collateral sources.

We submit that it is appropriate for the Wisconsin Supreme Court to decide these issues for several reasons. They are issues of first impression and involve serious constitutional issues. It is appropriate for the Supreme Court to

determine whether the legislature has impermissibly interfered in the functioning of the courts by allowing the jury to determine the measure of damages with no guidance and no meaningful review, and by improperly delegating to the jury its authority to establish public policy.

